UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

Local 40, RN Staff Council, Office and Professional Employees International Union (OPEIU), AFL-CIO,

Petitioner,

-and- **Case No. 07-RC-243228**

McLaren Macomb,

Employer.
_____/

Petitioner's Statement in Opposition to the Employer's Request for Review of Decision and Certification of Representative

Per Board Rule No. 102.67 (f), the Petitioner, by its undersigned attorneys, files this Statement in Opposition to the Employer's Request for Review of Decision and Certification of Representative. The Board should deny this most recent Request for Review (Request), just as it should deny the Employer's other two (2) pending Requests for Review. The Regional Director's Decision and Certification of Representative raises no substantial questions of law, as it is clearly supported by extant Board law and does not represent a departure from officially reported Board precedent. Nor does this case present compelling reasons for reconsideration of the Board's rules or policies regarding representation cases. There are no other reasons to grant this or any other of the Employer's Requests.

It is important to remember that despite the Employer's claims of objectionable conduct, in fact the evidence establishes that almost all eligible voters did vote, over 90%. In addition, despite the Employer's numerous objections involving only one or a few voters, the Union won the election by 59 votes, or about a 21% margin among unchallenged ballots cast

For the reasons stated in this and all of the Petitioner's other filings in this matter, hearing officers' reports, and the Regions' orders, it is requested the Board deny the Employer's Requests for Review and that all Regional Director decisions and orders in this matter be affirmed.

A. There were no Circumstances Surrounding the Employer's Challenged Ballots Mandating a New Election (It was unobjectionable and proper to Commingle ballots and not to Permit the Employer to Challenge Ballots Absent Credible Allegations of Changed Circumstances)

The Regional Director acted consistent with applicable law when dismissing the Employer's objection to the commingling of ballots and the agent's handling of the Employer's *ipse dixit* assertions of "changed circumstances."

Casehandling Manual (Manual) Section 11338.7, states in relevant part:

> Persons in job classifications specifically included by the Decision and Direction of Election should be given a ballot and permitted to vote without challenge based upon classification, unless there have been changed circumstances.
>
> Allegations of changed circumstances by the person seeking to challenge the employee should be reviewed by the Board agent. Unless plausible reasons are given for the challenge, the person specifically included should be permitted to vote without casting a challenged ballot.

This Section contemplates the exact issue in this case. After a protracted pre-election hearing, the Regional Director issued a Decision and Direction of election specifically including some job classifications in the petitioned-for unit, specifically excluding other classifications, and deferring decision on yet others. On election day, the Employer challenged voters in specifically included classifications based on an allegation of changed circumstances unsupported by any reasons.

The Section prescribed a specific approach to those challenges. The presiding Board agent had to "review" these challenges, and was supposed to denied deny them, because no reasons, let alone "plausible" reasons, were given to support the "allegations of changed circumstances."

This approach enjoys Board imprimatur. In *Anheuser-Busch*, LLC, 365 NLRB No. 70 (2017),

the Board stated it was unobjectionable for an agent not to permit a challenge to a specifically included classification where the employer "[had] not demonstrate[d] changed circumstances" when making the challenge when the voters attempted to vote on election day.

In permitting the challenges absent plausible reasons being given for changed circumstances, the agent ran afoul of the Section. Correcting for that error by commingling the improperly challenged ballots was unobjectionable. Nor was it unobjectionable for the agent to advise the Employer that, after commingling, he would not permit challenges to specifically included classifications unless supported by plausible reasons for alleged changed circumstances. It cannot be objectionable for an agent to essentially parrot the content of a section of the Manual.

Even though Section 11338.7 clearly applies to this case, the Employer's Request passes over this Section in absolute silence. Considering their approach throughout this case, this is hardly surprising. Instead, the Employer obfuscates by citing to other sections of the Manual which address challenges in general but do not address this circumstance. The Employer's argument is contrary to the Board's decision in *Europa Auto Imports, Inc.*, where the Board expressly cited to Section 11338.7 to state that specifically excluded[1] employees could not vote unless plausible reasons were given for changed circumstances. 357 NLRB 650 (2011).

In addition, it is axiomatic that where there is a provision specifically governing the situation at hand, it is that provision that governs, not those which speak to the situation generally. Therefore, it was Section 11338.7, not the Sections cited by the Employer, which governed the Employer's challenges.

There are no compelling policy reasons to find that commingling was objectionable. A contrary conclusion hamstrings the Regions from correcting their mistakes timely and without

[1] Identical language in the Section governs agent's handling of both specific inclusions and exclusions.

prejudice to any party. The Employer's position is an absurd result that etches into stone every little Regional misstep whether or not it could have affected the outcome of the election. This will drastically increase objections to elections, the number of reruns, and will cause parties to lose confidence in the Board's processes.

B. The Election Notice was Unambiguous and therefore does not Mandate a New Election

The Regional Director acted consistent with well-established precedent in adopting the Hearing Officer's recommended dismissal of the Employer's objection to an allegedly ambiguous election notice.

As a threshold matter, the Request mischaracterizes the Board's *Affiliate Midwest Hospital* decision, relied upon by the Regional Director, 266 NLRB 1198 (1983). While it is true that the decision merely included a Regional Director's decision on an allegedly deficient election notice in its appendix and did not rule on the notice specifically, the employer in that decision ultimately sought to persuade the Seventh Circuit not to enforce the Board's decision.

In the resulting Seventh Circuit decision, the Court did rule on the allegedly deficient election notice. Consistent with Board law unchanged since the Court's decision, the Court stated "we cannot overturn an election based on technical errors that reflect only on the NLRB's competence rather than the validity of the election. Affiliated Midwest's claim … requires an elevation of technical perfection over reality that cannot be accepted." *NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 533 (7th Cir. 1986).

That common-sense approach should and must govern here and requires denying the Request to the extent it is based on alleged election notice deficiencies. As the Regional Director has correctly pointed out, "the Employer does not offer any facts to support its assertion that any defect in the official Notice posting caused eligible employees not to vote."

The Employer makes too much of the thirty-four (34) eligible voters who did not vote. If

alleged deficiencies in the notice disenfranchised these employees, the election-day scene at the Employer's facility would have unfolded very differently than it did. If these employees in fact wanted to vote, they would have gone to the basement classrooms and congregated around the incorrect basement classroom, confused as to which classroom was the one for voting.[2] This did not happen. The 34 employees did not vote because they were indifferent to the election's outcome. If they really wanted to vote, they would have- at the very least- showed up in the vicinity of the basement classrooms on election day.

As also correctly pointed out by the Regional Director, there was at most one employee outside the voting area who did not know precisely where to vote. Crucially, however, this employee never indicated that this was because there was a deficiency in the Notice.

The election notices were not ambiguous and in fact that is demonstrated by the very high percentage of eligible employees who actually cast a ballot. Regardless, had the 34 employees who did not vote actually voted, their votes would not have affected the outcome of the election.

There are no compelling reasons to reconsider the Board's policies and procedures regarding minor deficiencies in election notices. Extant Board law adopts the common-sense approach that unless it is shown that an election notice disenfranchised voters, elections will not be set aside for superficial alleged deficiencies. A contrary approach elevates form (notices devoid of what amount to scriveners' errors) over substance (employee choice and finality,) all at needless cost to taxpayers and inconvenience and loss of time to the Regions.

C. There was no Improper Promise of Benefits by the Petitioner Mandating a New Election (Union Plus Benefits are Benefits Incidental to Membership Permitted by Extant Board Law)

The Regional Director acted consistent with well-established precedent in adopting the

[2] Not that this confusion would have been long-lasting, considering the copious Employer communications and signs advising employees of the specific classroom where to vote.

Hearing Officer's recommended finding that it was unobjectionable for the Petitioner to include links on websites to descriptions of Union Plus benefits. As correctly pointed out by the Regional Director, there is no evidence that the Petitioner stated to employees that Union Plus Benefits were conditioned on its electoral success. This distinguishes the instant case from each of the decisions cited by the Employer.

The OPEIU did not promise benefits to employees who voted for the Union. Rather, the website material simply describes benefits offered to all OPEIU members. A voter may vote against the Union but still receive the benefits if she subsequently joins the Union.

Alyeska Pipeline Company is also distinguishable because the benefit there was not truly "incidental" to membership. 261 NLRB 125 (1982) The union there implied that employees in the petitioned-for unit would have better access to skilled trades work than would already-existing members if the petitioned-for employees voted for the union. The Board concluded that the union implied that it would "grant[] … a new benefit which might flow to [employees in the petitioned-for unit] alone, should they become members." That was not so in the instant case, meaning that *Alyeska Pipeline* is inapposite.

Crestwood Manor and *Mailing Services*, also cited by the Employer, are inapposite for the same reason. 234 NLRB 1097 (1978); 293 NLRB 565 (1989). The benefits in those decisions, participating in a raffle and a free medical screening, were not truly incidental to membership, but instead flowed to the petitioned-for unit alone. Likewise, in *Wagner Electric Corporation*, the objectionable benefit, free life insurance and other benefits, were not shown to be incidental to membership. While Union Plus benefits may be contingent on membership in an AFL-CIO bargaining unit, they are not contingent on membership in *any particular* AFL-CIO bargaining unit, *i.e.* the petitioned-for unit in this case. Such benefits are indeed incidental to membership in an AFL-CIO union. Unlike in decisions cited by the Employer, these benefits do not flow to the

petitioned-for unit alone.

Any doubt on the propriety of the Union Plus benefits must be resolved in the Petitioner's favor. In each of the decisions cited by the Petitioner, a union widely disseminated its promised benefits. In *Alyeska Pipeline* and *Wagner Electric Corporation,* unions sent mailings to all employees promising benefits. In *Mailing Services,* a union used two vans emblazoned with its logo and parked outside a worksite entrance to disseminate its promised benefit. In *Crestwood Manor*, the union announced the benefit during an in-person meeting.

There is no evidence that the Petitioner disseminated its allegedly promised Union Plus benefits to nearly the same extent or, indeed, that a sole employee so much as visited its website and followed links to the Union Plus benefits description. This supports the correct conclusion that the Regional Director's dismissal of this objection was consistent with extant Board law.

There are no compelling policy reasons to revisit extant Board law on the promise of benefits. Revisiting Board law in this area would functionally prohibit almost every Union in this country from being able to use Board processes to organize new employees, as almost all unions offer some sort of benefit to their members, and dozens of maintain International Unions participate in Union Plus. This is a result plainly inconsistent with the Act, where Section 1 provides that the policy of the United States is to encourage collective bargaining.

D. There was no "Incorrect Recording" of Voters Mandating a New Election (The Incorrect recording Affected at Most one Ballot)

The Regional Director acted consistent with well-established precedent in adopting the Hearing Officer's recommended finding that the "incorrect recording of" Jennifer Baker as already having voted did not "mandate" a new election. As the Regional Director correctly stated, finding merit to this objection requires joining in speculation by the Employer that but-for the commingling of the seventy (70) challenged ballots, the Petitioner won the election by a mere one (1) vote margin.

Nor is the record devoid of evidence that it was in fact the Employer's Observer that made the mistake the caused two Jennifer Baker's to vote, if in fact a mistake was made. It is the Employer that must bear the heavy burden of showing that an election must be set aside. The Employer cannot meet this burden by appealing to speculation as to the margins but-for the commingled ballots.

There are no compelling reasons to reconsider Board policy and procedure in this area. It affronts the solemnity of the Board's election process to permit results to be set aside based on speculation.

E. There was no Improper Failure to Allow Inspection of Spoiled Ballots (The Representative had no Right to Inspect Spoiled Ballots)

The Regional Director correctly dismissed the Employer's objection to the refusal to allow its representative and attorney Kahn-Monroe to inspect spoiled ballots during the post-election vote count. As a preliminary matter, when Kahn-Monroe requested to inspect the ballots, they were not longer spoiled, but voided, since their "casters" had already cast replacement ballots. Nowhere does the Manual establish a right to inspect voided ballots.

Just as importantly, and as found by the Regional Director, Section 11322.3 of the Manual states only that *observers* have a right to inspect spoiled ballots, at the time of spoilage. It does not state that *representatives* have this right. The Manual's drafters knew and recognized the difference between observers and representatives, as the Manual has entirely different sections for observers and representative and prescribes very different roles for each. *Compare* CHM § 11310.1-.4 (Observers) with CHM § 11318.3 (Representatives). Accordingly, representatives have no right to inspect spoiled ballots, by strong negative implication.

Nor can the Employer avoid this conclusion by arguing, as it appears to, that its representative requested to inspect a ballot on behalf of its observer. By parity of logic, if representatives could act on behalf of observers when inspecting ballots, a supervisor-representative could be present at a

polling place during polling times "on behalf" of an observer, a plainly absurd result that must be avoided. For these reasons, representatives lack a right to inspect spoiled ballots, making it consistent with extant Board law not to permit Kahn-Monroe to inspect the spoiled ballot.

Even if the Employer's representative had a right to inspect the ballots, the election should still be upheld. What was the point and what would have been the effect of inspecting voided ballots? The Employer takes no discernible position on this point. Both of the voters involved were given new ballots and both cast those ballots, so the outcome of the election was not affected in any manner. Regardless, two (2) spoiled ballots could not have affected the election outcome.

There are compelling reasons for *not* permitting representatives to inspect spoiled ballots at polling areas and during polling times. The presence of these representatives during polling to inspect spoiled ballots, whether they be union- or employer-side, would destroy laboratory conditions.

F. There was no Improper Electioneering by the Petitioner's Agent (The *Milchelm* Rule is Inapplicable because Jeff Morawski's Conversation was not Prolonged, Occurred Outside Polling Times, and was in the presence of a Sole Voter)

It was consistent with extant Board law for the Regional Director to dismiss the Employer's electioneering objection. As a threshold matter, while it may be true that "the Employer is unaware of any authority for the Board having limited the application of its *Milchelm* rule to when the polls [are] open," in fact such authority exists. *See e.g., Nestle Co.*, 248 NLRB 732, 742 (1980); *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980); *Pastoor Brothers Co.*, 223 NLRB 451 (1976).

Particularly notable is the Board's decision in *Hudson Oxygen Therapy Sales Company*. 268 NLRB 1374 (1984). The Ninth Circuit enforced this decision which found a lack of objectionable conduct even where "[b]efore the commencement of [s] voting period, employees lined up outside the polling place … waiting to vote … [and] [t]he crowd chanted 'Vote Yes, Vote Yes,' for a period

of two or three minutes, but the chanting ceased several minutes before the opening of the polls." *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 731 (9th Cir. 1985). There is no allegation of such conduct by Morawski. Accordingly, the Regional Director correctly dismissed this objection, *a fortiori*.

The Regional Director also correctly rejected the Employer's invitation to speculate that Jeff Morawski's lack of testimony on his conversation should somehow means the conversation was prolonged and/or objectionable in content. It is the Employer's burden and not the Petitioner's to show objectionable conduct warranting setting aside election results. The Employer could have easily requested a subpoena at hearing to have Morawski testify to his conversation. It did not do so. That failure should and must not redound to the Employer's benefit.

Moreover, as also pointed out by the Regional Director, even if the Employer's speculation were improperly indulged, this would be insufficient to warrant setting aside election results. Under the Employer's speculative theory, at most one (1) ballot was affected by Morawski. This is far less that the Petitioner's margin of victory.

There are no compelling reasons to reconsider Board policy and procedure in this area. Setting aside elections based on mere speculation prolongs the Board's election processes, to the needless impairment of employers' interest in running their business free from the bedlam of incessant rerun elections obtainable based on mere speculation.

Nor should the Board revisit its longstanding precedent that *Milchem* does not apply outside polling times. Doing so needlessly impairs both employers' and unions' first amendment and Section 8 (c) interests by prohibiting expression of views, argument, and opinion not only during polling but at times outside of it.

G. The Presence of a Recording Device was not a "per se violation" (There is no Evidence that the "Selfie Taker" was a Union agent, that a picture was taken, or that any Employees witnessed the Attempted Selfie)

It was consistent with extant Board law for the Regional Director to dismiss the Employer's objection to an attempted "selfie." As a threshold matter, there is no evidence that any surveillance occurred, as there is no evidence that any employee other than the would-be selfie taker was in the vicinity of the attempted selfie. Moreover, even if there were employees in the vicinity, it is doubtful that the selfie would have been perceived as surveillance since the employee's mobile phone was tracked onto her, and her alone, and therfore unable to capture images of other employees. This alone shows that the Regional Director correctly dismissed this objection.

Even ignoring this fatal flaw in the Employer's objection leads to the same conclusion. The surveillance decisions cited by the Employer in its latest Request and other filings are all inapposite. They all featured agents of a party to an election. There is no evidence that the would-be selfie taker was a union agent. Absent such evidence, to show that the selfie was objectionable, the Employer needed to show that it "create[d] a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Mastec Direct TV*, 356 NLRB 809, 810 (2011). This, the Employer did not do.

There are no compelling reasons to reconsider the Board's policies in this area. Like with the Employer's other objections, there is no reason to order reruns based upon speculation-laden arguments. There is no reason to find that there is surveillance when there is no affirmative evidence of employees having been surveilled. The Board should reject the Employer's suggestion in its brief that the Regions be required to confiscate employees' mobile devices while they vote, to maximally guard against surveillance. This would drastically increase the Regions' workload and subject them to significant liability when it is claimed that the Region somehow mishandled, damaged, or lost mobile devices. It would also exclude potential voters who refused to give up possession of their phone.

H. The Cumulative Effect of the Conduct in the Instant Election Does not Warrant Setting Aside the Results (The Employer has Already Waived this Argument and it is Overly Vague)

As a threshold matter, Board Rule No. 102.69 (c) requires rejecting the Employer's "cumulative effect" argument. It is a novel objection already waived by the Employer's failure timely to raise it with the Region in its objections filed September 4, 2019. The objection must also be rejected as a vague and unspecific "catch-all" objection. *See e.g., Smithfield Packing Co.*, 344 NLRB 1, 172 (2004); *Airstream*, 288 NLRB 220, 229 (1988).

The Employer's citation to *Fresnius USA Manufacturing* 352 NLRB 679 (2008) does not change this conclusion. While the Board in *Fresnius* did couch its holding by stating that the cumulative effect of these objections required a new election, the Board *did* sustain four (4) specific objections in that decision, each of which went to mishandling ballots in an election with a razor-thin election margin, where a union prevailed by a single vote. There was no such margin in this case and none of the Employer's specifically enumerated objections have any merit.

There are no compelling policy reasons to revisit precedent in order to sustain this objection. Permitting a party to set aside election results on such a transparently make-weight theory deprives the opposing party of its due process right to respond to specific allegations of objectionable conduct. This offends due process norms. This result that must be avoided.

Conclusion

For the above reasons, and those stated in Petitioner's earlier filings in this matter, hearing officers' reports, and the Regions' orders, the Board should deny the Employer's latest Request for Review and all its other Requests for Review. The Board should affirm all Regional Director actions in this matter, including the certification of the Petitioner as collective bargaining representative.

Respectfully Submitted:

/s/ Scott A. Brooks
/s/ Richard M. Olszewski
GREGORY, MOORE, BROOKS & CLARK, PC
Attorneys for the Petitioner

DATED: January 13, 2020

Detroit, Michigan